FILED

97 698 OCT 20 1997

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

October Term 1997

DAYNA R. PATRICK LAYMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

Dennis W. Dohnal*
Counsel of Record
BRENNER, DOHNAL, EVANS & YOFFY, P.C.
411 East Franklin Street
Suite 200
Richmond, VA 23218-0470
(804) 644-1300

John E. Lichtenstein
Charles M. Smith, Jr.
LICHTENSTEIN AND FISHWICK, P.L.C.
Liberty Trust Building, Suite 505
101 South Jefferson Street
Roanoke, Virginia 24011
(540) 343-9711

Counsel for Petitioner

THE LEX GROUP ♦ 1205 East Main Street ♦ Suite 2 East ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3256

40 pp

QUESTIONS PRESENTED

I. Whether the sentencing discretion of the trial court allows it to delay closure of a sentencing proceeding to receive additional information and ultimately to impose a sentence consistent with the court's final oral articulation of sentence but which differs from an initial oral articulation?

II. Whether the trial court loses jurisdiction to sentence a defendant before its entry of the written sentencing order?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

OPINION BELOW 2

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING
THE PETITION FOR WRIT OF CERTIORARI 5

I. THE FOURTH CIRCUIT DECISION CONFLICTS WITH STATUTORY LANGUAGE AND LEGISLATIVE HISTORY OF SECTION 3582 5

A. The Legislative History of Section 3582 Upholds Retention of the Discretion Exercised by the Trial Court in This Case -- Discretion Now Being Eroded by Judicial Edict 6

B. The Context of Section 3582(c) and Related Provisions Support Petitioner's Interpretation -- The Fourth Circuit Decision Undermines a Coherent Sentencing Scheme 7

C. The Focus of the Fourth Circuit's Analysis was Misguided. Rule 35(c) Does Not Limit the Authority of the Trial Court 11

D. The Fourth Circuit's Decision Conflicts with the Holdings and Reasoning of the United States Supreme Court 13

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONGST THE CIRCUITS: WHETHER IMPOSITION OF SENTENCE CONCLUDES WITH ORAL PRONOUNCEMENT OR UPON ENTRY OF THE WRITTEN JUDGMENT 14

A. Three Circuits Have Defined Imposition of Sentence to Conclude with Oral Pronouncement of Sentence 17

B. A Split in Authority is Developing Within Specific Circuits 19

C. The Basis for the Fourth Circuit's Opinion Involves a Split Amongst the Circuits As Regards the Purpose and Effect of the Written Order 22

III. THIS CASE PRESENTS A LEGAL QUESTION OF SIGNIFICANT PUBLIC IMPORTANCE 23

A. A Rigid Definition of Imposition of Sentence Inhibits Reasoned Decision Making.....24

B. Rigid Definition of Imposition of Sentence Will Lead to Widespread Confusion and Procedural Inefficiency 26

C. The Fourth Circuit's Decision Creates an Inevitable Conflict with the Sentencing Guidelines Which Recognize the Interdependent Nature of Related Sentences and Will also Encourage Inequity Between Co-Defendants 27

D. Failure to Correct the Fourth Circuit's Decision Will Result in a Significant Deprivation of Liberty to the Defendant 28

CONCLUSION 29

TABLE OF AUTHORITIES

CASES **PAGE**

Basset v. United States,
76. U.S. (9 Wall.) 38 (1869) 5 5

Berman v. United States,
302 U.S. 211 (1927) 11

Dorszynski v. United States,
418 U.S. 424 (1973) 12, 25

Corey v. United States,
375 U.S. 169 (1963) 14

Hill v. Wampler,
298 U.S. 460 (1936) 13, 14

In re United States,
898 F.2d 1485 (11th Cir. 1990) 15, 16, 26

Korematsu v. United States,
319 U.S. 432 (1942) 14

Lemke v. United States,
346 U.S. 325 (1953 13

United States v. Abreau-Cabrera,
64 F.3d 67 (2nd Cir. 1995) 17-24

United States v. Barnes,
948 F.2d 325 (7th Cir. 1991) 26

United States v. Benz, 282 U.S. 304 (1931) 5

United States v. Bonito,
57 F.3d 167 (2nd Cir. 1995),
cert. denied, ___ U.S. ___, 116 S.Ct. 713 (1996) 20, 21

United States v. Clay,
37 F.3d 338 (7th Cir. 1994) 4, 15, 16

United States v. Cook,
890 F.2d 672 (4th Cir. 1989) 12

United States v. Crowder,
947 F.Supp.1183 (E.D.Tenn.1966) 28

United States v. DeMartino,
112 F.3d 75 (2nd Cir.1997) 21

United States v. DiFrancesco,
449 U.S. 117 (1980) 6, 18

United States v. Fahm,
13 F.3d 447 (1st Cir. 1994) 15

United States v. Harrington,
741 F.Supp. 968 (D.D.C. 1990), *vacated on other grounds*,
947 F.2d 956 (D.C. Cir. 1991) 17

United States v. Hashagen,
816 F.2d 899(3rd Cir.1987) 11

United States v. Jackson,
32 F.3d 1101 (7th Cir. 1994) 23

United States v. Jordan,
810 F.Supp. 262 (D.C. Cir. 1987), *cert denied*,
481 U.S. 1032 (1987) 15, 17

United States v. Kaufman,
951 F.2d 793 (7th Cir.1992), *cert. denied*,
508 U.S. 913 (1993) 27

United States v. Margiotti,
85 F.3d 100 (2nd Cir. 1996), *cert. denied*,
__U.S.__,117 S.Ct. 324 (1996) 21, 25

United States v. Mendoza,
118 F.3d 707, 710 (10th Cir. 1997),
cert. petition filed September 29, 1997
(No. 97-6202) 27

United States v. Morillo,
8 F.3d 864 (1st Cir. 1993) 15

United States v. Navarro-Espinosa, 30 F.3d 1169
(9th Cir. 1994) 18, 20

United States v. Pless,
982 F.2d 1118 (7th Cir. 1992). 25

United States v. Ray,
950 F.Supp. 363 (D.D.C. 1996) 9

United States v. Rico,
902 F.2d 1065 (2nd Cir. 1990) 12

United States v. Smith,
929 F.2d 1453 (10th Cir. 1991) 18

United States v. Townsend,
33 F.3d 1230 (10th Cir.1994) 17, 18

United States v. Turner,
998 F.2d 534, 536 (7th Cir. 1993), *cert. denied*,
510 U.S. 1026 (1993) 8

United States v. Villano,
816 F.2d 1448 (10th Cert 1987) 24

United States v. Wilson,
503 U.S. 329 (1992) 9

STATUTES AND RULES

18U.S.C.§ 924(c) 27

18U.S.C.§3582.....*passim*

18 U.S.C. § 3553(c) 25

18 U.S.C. § 4208 (b) 14

Fed.R.App.P.4(b) 10, 11

Fed.R.Crim.P.35(c) .....*passim*

U.S. Sentencing Guidelines § 5B1.1 (a)(2) 4

U.S. Sentencing Guidelines § 5C1.1(c)(3)
(1996).....3, 4

U.S. Sentencing Guidelines § 5F1.2 (1996) 4

MISCELLANEOUS

Kobakes, *Criminal Sentencing: Should the "Judge's Sound Discretion" be Explained*, 59 Judicature 184 (1975) 24

S. Rep. No. 225, 98th Cong., 2d Sess. 158 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182 ..... 6, 8

In the Supreme Court of the United States

OCTOBER TERM, 1997

No.

DAYNA R. PATRICK LAYMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioner, Dayna R. Patrick Layman, petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this case on July 22, 1997.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 116 F.3d 105 and is included in the Appendix at 1-10.

JURISDICTION

The decision of the court of appeals was issued on June 24, 1997. An order, denying a petition for rehearing, was entered on July 22, 1997. The jurisdiction of this Court to issue a writ of certiorari in this case is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 3582(c) provides:

> (c) Modification of an imposed term of imprisonment.--The court may not modify a term of imprisonment once it has been imposed except that...

Section 3582(c) proceeds to list multiple exceptions that neither side argues are applicable to this case. One of the exceptions listed refers directly to Rule 35 of the Federal Rules of Criminal Procedure. Rule 35(c) provides:

> (c) Correction of Sentence by Sentencing Court. The court, acting within 7 days after the imposition of sentence may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error.

The full text of 18 U.S.C. § 3582(c) and of Rule 35(c) is set forth in the Appendix at 58-61.

STATEMENT OF THE CASE

This case reaches the heart of the issue of the control of the trial judge over the manner and scheduling of sentencing.

The facts, as concern the two issues of this Petition, are not in dispute. Dayna Layman plead guilty to one count of conspiracy to manufacture and distribute marijuana on December 20, 1995.

Layman's sentencing hearing was scheduled for May 17, 1996 at 1:30 p.m. She was one of three co-defendants to be sentenced that day. Due to an unrelated case, the Assistant United States Attorney was delayed, and Layman's sentencing hearing (the first of three sentencing hearings) did not commence until after 4:00 p.m. After extensive testimony, the court found Layman accountable at a total offense level of ten under the sentencing guidelines. Such level allowed the court's consideration of home confinement as well as incarceration. *See* U.S. Sentencing Guidelines §§ 5C1.1(c)(3), 5F1.2 (1996).

While stating "I believe that calls for a period of incarceration of from six to twelve months", the court never addressed the possibility of home confinement in announcing a period of imprisonment of nine months. App. at 80. However, the court explicitly left sentencing open, pending receipt of information from counsel for Layman concerning where Layman wished the court to recommend that she be housed. *Id.* at 82. Counsel for Layman requested that the Court allow time to investigate and advise the Court. In response, the Court stated that it would not enter a sentencing order at that time. *Id.* at 83.

The court entered neither a final order nor a commitment order. On the following Tuesday, May 21, Layman filed a Motion for Home Detention asking the Court to allow the sentence to be served under home confinement. *Id.* at 85-86. The motion was limited to asking the court to

exercise its authority to designate home confinement pursuant to Sections 5B1.1(a)(2), 5C1.1(c)(3), and 5F1.2 of the Sentencing Guidelines. It was not filed pursuant to Rule 35 as the motion was not intended to correct arithmetical, technical or other clear error. The court then scheduled the continuation of the sentencing for May 30, 1996.

On May 30, 1996, the court initially explained that there had been "no imposition of sentence." App. at 92. The court then noted that the sentences had been imposed in the cases of the co-defendants, but that following May 17, the court expressly delayed imposition of sentence. *Id.* The court explained that the second hearing was a "continuation of the sentencing hearing on May 17." *Id.* at 93.

Further, counsel for Layman clarified that "previous to today Mrs. Layman had not asked the court yet to see the home confinement subsection... and that was the purpose for coming here. That had not been raised before." *Id.* The court acknowledged counsel's statement by agreeing, "Right." *Id.* at 94-5. Following argument from both counsel, the court sentenced defendant to nine months home detention "as a substitution for the imprisonment" plus an additional thirty-six (36) months of supervised release *Id.* at 99.

Later informed that such sentence must be a function of probation and prior to the entry of any order, on June 4, 1997, Layman was sentenced to thirty-six (36) months probation with the first nine months designated as home detention. The first and only sentencing order in this case, reflecting the June 4 sentence, was entered on June 5, 1997.

The United States appealed the court's decision. The court of appeals held that a sentence is imposed under Rule 35(c) when it is orally pronounced by the district court. Although raised in petitioner's brief, the Fourth Circuit neither addressed nor interpreted 18 U.S.C. § 3852(c). The court acknowledged that its ruling was at odds with the Seventh Circuit's decision in *United States v. Clay*, 37 F.3d 338 (7th Cir. 1994) which held that imposition of sentence

under Rule 35(c) refers to the entry of a judgment of conviction. App. at 62. The Fourth Circuit remanded the case to the district court with an order that the court impose the first pronouncement of sentence.

Layman petitioned for rehearing with a suggestion for rehearing en banc, but the petition was denied. App. at 47.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

This case presents an important question on which the courts of appeal are divided, the context of which is relevant to district courts throughout the country. The issue affects the discretion a trial judge may exercise in determining the procedure and conduct of a sentencing and the ability of the judge to impose a sentence he or she determines is not only consistent with controlling statutory authority but is just and appropriate; this notwithstanding that it may amend a previously orally articulated description of disposition which was never imposed. This appeal calls for resolution of the competition between the sole written order consistent with a final oral articulation of sentence and an initial oral articulation of sentence inconsistent with the only written order of judgment.

I. THE FOURTH CIRCUIT DECISION CONFLICTS WITH STATUTORY LANGUAGE AND LEGISLATIVE HISTORY OF SECTION 3582.

Historically, a general rule had been recognized that a trial court had the power to recall a defendant who had already been sentenced and to impose a different sentence from that originally imposed. *Bassett v. United States*, 76 U.S. (9 Wall.) 38 (1869); *United States v. Benz*, 282 U.S. 304, 306-07 (1931). This power was subject to the

limitation, grounded in the transfer of control from the judiciary to the executive branch, that a sentence could not be increased if a fine had been paid or if the defendant had commenced service of a term of imprisonment. *United States v. DiFrancesco*, 449 U.S. 117, 134 (1980).

A. The Legislative History of Section 3582 Upholds Retention of the Discretion Exercised by the Trial Court in This Case -- Discretion Now Being Eroded by Judicial Edict.

Sweeping legislative reform in 1984 imposed legislative constraints on the above-described judicial power. Congress enacted Section 3582 as part of the Sentencing Reform Act of 1984, Pub.L. No. 98-473, Title II, § 212(a)(2), 98 Stat. 1837, 1998. Section 3582(c) circumscribed the judicial power to revisit a previously imposed sentence, providing that:

> Modification of an imposed term of imprisonment.--The Court may not modify a term of imprisonment once it has been imposed except that--...

At what point a sentence "has been imposed" is the subject of this appeal and is without obvious answer. Curiously, the legislative history is silent as to the point at which the trial court relinquishes sentencing authority. After describing what it termed "safety valves" for later review, the Senate Report Commentary to section 3582(c) concludes that "[t]he approach taken keeps the sentencing power in the judiciary where it belongs, yet permits later review of sentencing in particularly compelling situations." S.Rep. No. 225, 98th Cong., 2d Sess. 158 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3304.

The "later" review Congress was referring to was the accompanying Rule 35(b) provision which, when enacted in 1984, granted the trial court discretion to revisit and reduce the sentence within 120 days after imposition. While Congress has constricted that "later" power of review, no language has been adopted to restrict the judicial power over the manner or scheduling by which the defendant is sentenced. Absent an express legislative restriction of this power, courts should not restrict such judicial discretion.

Now, many appellate courts are reading this language expansively, not only to preclude later review, but in effect, to prematurely terminate a sentencing hearing upon initial articulation of a sentencing scheme and contrary to the judge's intent. Such an interpretation is not required by the statutory language and is clearly contrary to congressional intent to "[keep] the sentencing power in the judiciary where it belongs." In this appeal, petitioner argues that sentence had not been "imposed" for two reasons: (1) the court explicitly left sentencing open to receive additional information; and (2) an action is not after "sentence has been imposed" unless it occurs after entry of the written sentencing order.

B. The Context of Section 3582(c) and Related Provisions Support Petitioner's Interpretation -- The Fourth Circuit Decision Undermines a Coherent Sentencing Scheme.

The trial judge's decision to continue the sentencing pending receipt of information regarding prison facilities is directly encouraged by the Code. Section 3582(a) provides, as part of "[f]actors to be considered in imposing a term of imprisonment," the judge "shall consider any pertinent policy statements issued by the Sentencing Commission..." in determining "whether to make a recommendation concerning the type of prison facility appropriate for the

defendant." 18 U.S.C. § 3582(a). According to the legislative history, Section 3582 was designed to allow that "the judge may recommend a type of prison facility suitable for the defendant." Senate Comm. on Judiciary, Comprehensive Crime Control Act of 1984, S. Rep. No. 948-225, 98th Cong., 2d Sess. (1984), reprinted in 1984 U.S.C.A.A.N. 3182, 3299.

Here, the court expressly had not entered any order, final or commitment. It did not yet have information necessary regarding what it would find as a suitable prison facility. As such, the trial court had not imposed sentence and expressly had not relinquished its power to sentence the defendant. If the Fourth Circuit's decision is allowed to stand, articulation of punishment will divest the Court of the ability to comply with the mandates of Section 3582(a). Technically, by articulating what the Fourth Circuit found to be a complete and enforceable sentence, the trial judge in this case no longer retained sentencing authority and was thus powerless to recommend a suitable facility as required by statute.

The Fourth Circuit's decision centers on holding that "imposition of sentence" occurs when the judge orally pronounces sentence, and the judge is thereafter barred from actions relating to sentencing unless explicitly authorized by rule or statute. Undeniably, the sentencing hearing and the oral pronouncement of sentence are part of the process of imposition of sentence. However, until written entry of the sentencing order, the trial judge retains sentencing authority over the defendant. *See United States v. Turner*, 998 F.2d 534, 536 (7th Cir. 1993), *cert. denied*, 510 U.S. 1026 (1993) (district judge's power to alter sentence expires from date judgment docketed). A sentence has not "been imposed" until entry of the written order.

Moreover, Congress did not choose one construct of imposition of sentence over the other. The strongest indicator of intent is found in the tense employed. Barring

action after sentence "has been imposed" implies a complete break from the imposition process. *See United States v. Wilson*, 503 U.S. 329 (1992) (holding tense of term "was imposed" in 18 U.S.C. § 3585(b) "is significant in construing statute.") Tellingly, the original judgment form, A 245 S, provided by the Administrative Office of the United states Courts and used throughout the federal system provides that "The sentence is imposed pursuant to the Sentencing Reform Act of 1984." *United States v. Ray*, 950 F.Supp. 363, 367 (D.D.C. 1996) (emphasis added).

The interpretation that sentence is not imposed until entry of the written order is further supported by a complete reading of section 3582 which also establishes the finality of the judgment. Subsection 3582(a) addresses the factors to be considered in imposing a term of imprisonment. Subsection 3582(b), entitled "Effect of Finality of Judgment," explains that a sentence constitutes a final judgment even though it may be modified under limited circumstances. Then, subsection 3582(c) lists those circumstances under which a term of imprisonment, once it has been imposed, may be modified. The chronological progression of Section 3582, which mandates a sentence is a final judgment before addressing modification of the sentenced, clearly assumes a sentence has not been imposed until all aspects of sentencing are completed.

Moreover, Section 3582 directly connects imposition of sentence with the finality of judgment. Subsection (b), entitled "Effect of Finality of Judgment" provides that "[n]otwithstanding the fact that a sentence to imprisonment can subsequently be (1) modified pursuant to the provisions of subsection (c)... a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes." 18 U.S.C. § 3582(b) (1996, as amended) (emphasis added).

The interpretation that sentence is not imposed until entry of the written order is further supported by a complete

reading of section 3582 which also establishes the finality of the judgment. Subsection 3582(a) addresses the factors to be considered in imposing a term of imprisonment. Subsection 3582(b), entitled "Effect of Finality of Judgment," explains that a sentence constitutes a final judgment even though it may be modified under limited circumstances. Then, subsection 3582(c) lists those circumstances under which a term of imprisonment, once it has been imposed, may be modified. The chronological progression of Section 3582, which mandates a sentence is a final judgment before addressing modification of the sentenced, clearly assumes a sentence has not been imposed until all aspects of sentencing are completed.

Moreover, Section 3582 directly connects imposition of sentence with the finality of judgment. Subsection (b), entitled "Effect of Finality of Judgment" provides that "[n]otwithstanding the fact that a sentence to imprisonment can subsequently be (1) modified pursuant to the provisions of subsection (c)... a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes." 18 U.S.C. § 3582(b) (1996, as amended) (emphasis added).

The reference to finality of judgment employs language used in determining when a party may exercise a right of appeal -- something that may not be done until after entry of the written judgment. *See* Fed.R.App.Proc. 4(b). The holdings of this Court make clear that written judgment must be entered for the judgment to be final:

> In criminal cases, as well as civil, the judgment is final for the purpose of appeal 'when it terminates the litigation... on the merits' and leaves nothing to be done but to enforce by execution what has been determined.

Berman v. United States, 302 U.S. 211, 213 (1927).

The language of Federal Rule of Appellate Procedure 4(b) further supports petitioner's interpretation. The Rule finds that a "notice of appeal filed after the announcement of a decision, sentence, or order--but before entry of the judgment or order--is treated as filed on the date of and after the entry." Fed.R.App.P. 4(b). The Commentary to subdivision (b) uses imposition of sentence and entry of judgment interchangeably noting that "in a criminal case, a post-trial motion may be disposed of more than 10 days before sentence is imposed, i.e. before the entry of judgment." Commentary to Fed.R.App.P. 4(b); citing *United States v. Hashagen*, 816 F.2d 899, 902 n.5 (3rd Cir. 1987). This language represents the only attempt anywhere in the Code to define "imposition of sentence."

C. The Focus of the Fourth Circuit's Analysis was Misguided. Rule 35(c) Does Not Limit the Authority of the Trial Court.

The Fourth Circuit's analysis ignored Section 3582(c), limiting its analysis to whether the actions of the trial judge were authorized pursuant to Rule 35(c). However, the Fourth Circuit's focus on Rule 35 is misplaced as the instant actions of the defendant and the trial court were neither pursuant to nor governed by the Rule. Layman specifically stated that the motion for home detention was not filed pursuant to Rule 35(c). Further, Rule 35(c) prohibits nothing; it provides that:

> The court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error.

Fed.R.Crim.P. 35(c). Rule 35(c) is merely one listed exception to the United States Code section limiting judicial action after a sentence has been imposed.

The present version of Rule 35(c) was adopted in 1991 and codified the decisions of the Second and Fourth Circuit recognizing an inherent power of the Court to correct a sentence imposed as a result of arithmetical, technical, or other clear error. *See United States v. Rico*, 902 F.2d 1065 (2nd Cir. 1990); *United States v. Cook*, 890 F.2d 672 (4th Cir. 1989). Rule 35(c)'s only restrictive nature is to limit the time for said correction to seven days after "imposition of sentence." While the calculation of the seven day time period requires determining when the seven days begins to run, Rule 35(c) was not enacted to define "imposition of sentence," nor does it purport to create any limitation until after the seven days has expired. Instead, Rule 35(c) merely incorporates the restriction in Section 3582(c) which limits trial court sentencing authority after sentence has been imposed.

Further, the Commentary to Rule 35(c) indicates that its framers envisioned the seven day time period to run from entry of the written order as it connects the time after imposition of sentence to the time for filing an appeal. "The Committee believed that the time for correcting such errors should be narrowed within the time for appealing the sentence to reduce the likelihood of jurisdictional questions..." Commentary to Fed.R.Crim.P. 35(c). Rule 35(c) limits judicial power after entry of the written order and thus does not implicate the court's actions in this case. *See Dorszynski v. United States*, 418 U.S. 424, 440 (1973) (holding Court "unwilling to ascribe to the Congress an intent to import, *sub silentio*, sentencing doctrine contrary to traditional powers of sentencing judges").

D. The Fourth Circuit's Decision Conflicts with the Holdings and Reasoning of the United States Supreme Court.

This Court has not directly addressed the basic question of the definition of imposition of sentence. However, this Court has many times addressed procedural questions surrounding the imposition of sentence with a unifying purpose of preventing rigid interpretations of the Rules from infringing on the rights of the accused.

In *Lemke v. United States*, 346 U.S. 325 (1953), this court examined a situation where a defendant filed an appeal after sentence was orally pronounced but before entry of written judgment. The *Lemke* Court accepted without dispute that judgment was final only after entry of the written judgment, but held that the notice of appeal was on file when judgment was entered, and, under such circumstances, a premature appeal is also a timely appeal. *Id.* at 325.

Earlier decisions of this Court clearly hold that imposition of sentence occurs upon written entry of judgment. In *Hill v. Wampler*, 298 U.S. 460 (1936), the Court wrote:

> The choice of pains and penalties, when choice is committed to the discretion of the court, is part of the judicial function. This being so, it must have expression in the sentence, and the sentence is the judgment. Two of the questions certified to us... make mention of a variance between the commitment and the sentence "orally pronounced." If that were the only variance, we should deem it unimportant. The only sentence known to law is the sentence or judgment entered upon the records of the court. If entry is inaccurate, there is a remedy

> by motion to correct it to the end that it may speak truth.

Id. at 464 (citations omitted). To the extent this Court has adopted such language and lower courts are not following said language, further confusion is created and more defendants are left without an expected remedy by relying on such language.

The reasoning employed by this court in *Corey v. United States*, 375 U.S. 169 (1963) was also telling. In *Corey*, this Court addressed the rights of appeal for a defendant committed by order to the custody of the Attorney General pending study of the appropriate sentence to be imposed pursuant to then 18 U.S.C. § 4208(b). The Court held that both the commitment order and the later alteration of sentence by the Attorney General were points at which appeal "must be taken promptly after sentence is imposed." *Id.* at 172.

Clearly, sentence is deemed imposed when it becomes a final enforceable judgment. The institution of punishment creates the finality warranting appeal, not mere oral articulation of sentence. As this Court deemed sentence imposed when the judgment becomes final, this Court has repeatedly held a judgment is final when it "leaves nothing to be done but to enforce by execution what has been determined." *Korematsu v. United States*, 319 U.S. 432, 435 (1942).

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONGST THE CIRCUITS: WHETHER IMPOSITION OF SENTENCE CONCLUDES WITH ORAL PRONOUNCEMENT OR UPON ENTRY OF THE WRITTEN JUDGMENT.

Over the past six years, a significant split has developed among the circuits. Not only do the decisions conflict, but the reasoning employed by the circuits differs vastly, with far reaching implications.

To date, the First, Seventh, Eleventh, and D.C. Circuits have found that imposition of sentence is not complete until entry of the written judgment order. *United States v. Fahm,* 13 F.3d 447 (1st Cir. 1994); *United States v. Clay*, 37 F.3d 338 (7th Cir. 1994); *In re United States*, 898 F.2d 1485 (11th Cir. 1990); *United States v. Jordan*, 810 F.2d 262, 266 (D.C.Cir. 1987), *cert. denied*, 481 U.S. 1032 (1987).

Initially, the First Circuit in *Fahm* confined its analysis to Rule 35(c) looking to the judgment and docket entry which plainly reflected that sentence was "imposed" on the date of written entry. *Fahm* at 453. The court cited a previous First Circuit decision, *United States v. Morillo*, 8 F.3d 864, 869 (1st Cir. 1993) which noted that imposition of sentence likely starts the clock running at the same time the period for filing a notice of appeal begins -- with entry of the judgment or order. The *Fahm* Court offered the initial justification that Federal Rule of Criminal Procedure 32(b)(1) requires that the judgment shall be signed and entered by the clerk.[1]

The Seventh Circuit, in the *Clay* decision, also cited *Morillo*, but further noted the 1993 advisory committee note

---

[1] In *Fahm*, the District Court overruled defense counsel's motion to stay imposition of sentence, but allowed defense counsel to submit written opposition. The order was docketed the same day. Therefore, the distinction between oral pronouncement and written order was not material to the First Circuit's decision. However, the district court's election to conduct a second sentencing hearing almost three months later and amend its sentence illustrates the present widespread confusion regarding sentencing procedure.

to subdivision (b) of Federal Rule of Appellate Procedure 4 that "a post-trial motion may be disposed of more than 10 days before sentence is imposed, i.e. before the entry of judgment." *United States v.* Clay, 37 F.3d at 340. This represents the only legislative attempt to define the point at which sentence is imposed, and the only circuit court to cite said definition to date.

The Eleventh Circuit, in its decision *In re U.S.*, addressed a vastly different factual situation. The defendant pled guilty to five counts of bank robbery. At sentencing, the court noted that each count related to a different bank robbery but all five counts were in the same indictment. The court stated that the government should have prepared five separate indictments. The court then proceeded to sentence defendant solely on count I of the indictment, orally articulating a sentence of twelve-years imprisonment on April 13, 1987.

Over one year later, the government moved to sentence the defendant on counts II through V. However, on July 26, 1989, the court dismissed those counts, holding the passage of time violated the defendant's sixth amendment right to a speedy sentencing. *In re U.S.*, 898 F.2d at 1486. The defendant then filed a motion under former Federal Rule of Criminal Procedure 35(b) to reduce his sentence to time served, said motion being granted by the court on August 22, 1989.[2]

The Eleventh Circuit upheld said motion as timely finding that "the rule clearly indicates that sentence is imposed when the sentencing order is an appealable final judgment." *Id.* at 1487. The court then explained that the

---

[2] For offenses committed prior to November 1, 1987, Fed.R.Crim.P. 35(b) provided that "[a] motion to reduce sentence may be made, or the court may reduce sentence without motion, within 120 days after the sentence is imposed."

defendant must be sentenced on all counts, or the accounts must be otherwise disposed of, before sentence is imposed. While, arguably, a defendant has a right to appeal a sentence he is serving in spite of remaining outstanding counts, the Eleventh circuit formulation requires both written order and disposal of all charged counts before the trial relinquishes any sentencing control.

Finally, the D.C. Circuit court has adopted a completely different demarcation line for relinquishing sentencing authority. The *Jordan* court held that the district court:

> retains the power to recall the defendant and increase severity of sentence at any time before he begins to serve the sentence and *a fortiori* before he leaves the courthouse.

Jordan, supra, 810 F.2d 262, 266 n. 1. This decision was recently applied by the District Court of the District of Columbia to hold that the sentencing process continues while a defendant is still in the courthouse." *U.S. v. Harrington*, 741 F.Supp. 968 (D.D.C. 1990); *vacated on other grounds*, 947 F.2d 956 (D.C.Cir. 1991). Thus, in the District of Columbia, the defendant's sentencing fate may be determined as it initially was in *Harrington*, by whether a defendant chooses to forgo lunch and remain in the courthouse.

A. Three Circuits Have Defined Imposition of Sentence to Conclude with Oral Pronouncement of Sentence.

Joining the Fourth Circuit in holding that sentence has been imposed upon oral pronouncement are the Second and Tenth Circuits. *United States v. Abreau-Cabrera, 64 F.3d 67 (2nd Cir. 1995); United States v. Townsend*, 33 F.3d 1230 (10th Cir. 1994).

The *Abreau-Cabrera* Court initially noted that this issue "is an unresolved question that has created a split among the courts of appeals." 64 F.3d at 73. The Court then held that interpreting Rule 35(c) to refer to written judgment would allow courts to delay written entry to have "a change of heart" and alter the sentence --"a sequence of events we believe to be beyond what the rule was meant to allow." Divining this intent from the language and Commentary to Rule 35 ignores the function of Rule 35 as enumerated exception to a Code section limiting judicial power. Again Rule 35(c) is being transformed from a grant of judicial power to correct error to a limitation on judicial power.

Meanwhile, the Tenth Circuit determined entry of the written order to be purely a ministerial task, and found that sentence orally imposed governs a conflicting, later written sentence. *Townsend*, 33 F.3d at 1231.[3]

Finally, the Ninth Circuit, in essence, threw up its hands in frustration and left the question unanswered. *U.S. v. Navarro-Espinosa*, 30 F.3d 1169 (9th Cir. 1994). The facts in *Navarro-Espinosa* are virtually identical to these facts. The court orally articulated a sentence, but delayed formal entry of the sentence. The government then moved to correct

---

[3] There remains an unreconciled split within the Tenth Circuit. In *U.S. v. Smith*, 929 F.2d 1453 (10th Cir. 1991), *cert. denied*, 502 U.S. 847 (1991), the court's oral pronouncement of sentence was "clear and unambiguous." However, upon increasing the sentence previously given, the district court held that jurisdiction to so act lay with the court by virtue of the court having not imposed sentence through entry of the written order. *Id.* at 1456. The Tenth Circuit upheld the exercise of the court's discretion and the sentence pronounced at the final sentencing hearing which occurred in excess of two months after the first. *Id.* at 1456-57. The Tenth Circuit decision is an anomaly in the fact that it failed to even mention Section 3582 or Rule 35, instead relying on the established judicial discretion reaffirmed in *DiFrancesco*. *Id.* Although *Townsend* failed to mention the *Smith* decision, Judge McKay authored both a concurrence in *Townsend* and the dissent in *Smith*.

defendant's sentence by adding conditions of probation. The district court added those conditions, and the defendant appealed arguing Rule 35(c) prohibited any amendment more than seven days after imposition of sentence.

The Ninth Circuit read the legislative history of Rule 35(c) to attempt to narrow the time for correction while noting the district court's conclusion that the language employed runs from seven days after the "formal entry of judgment." *Id.* at 1171. The Court then wrote:

> The interpretation of Rule 35 is a difficult issue, for while the intention of the drafters seems fairly clear, the language chosen does not further it. We hope that the Advisory Committee on Criminal Rules will be able to clarify this point.

Id. at 1171. The Ninth Circuit concluded that it did not need to resolve the Rule 35(c) issue holding that the district court was empowered to modify conditions of supervised release pursuant to 18 U.S.C. § 3583(e)(2) and Federal Rules of Criminal Procedure 32.1(b).

Technically, the Fourth Circuit's interpretation of Rule 35(c) as a codified restriction on modification of sentence creates an unresolvable conflict with 18 U.S.C. § 3583(e)(2) and Rule 32.1(b), prohibiting what those sections authorize. The *Abreau-Cabrera* analysis, defining Rule 35(c) as a limitation on judicial authority also creates this conflict.

B. A Split in Authority is Developing Within Specific Circuits.

Not only does a split exist between the circuits, but intra-circuit splits are developing as well. In additional to the split within the Tenth Circuit previously noted in

Footnote 3, *supra*, the developing Second Circuit jurisprudence reveals the mischief that results from a rigid interpretation of "imposition of sentence." The Second Circuit's decision in *Abreau-Cabrera*, relied upon by the Fourth Circuit, explicitly held sentence is "imposed" upon oral pronouncement. However, concurrent and subsequent decisions of the Second Circuit have abandoned that rationale.

In *United States v. Bonito*, 57 F.3d 167 (2nd Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 713 (1996), decided two months prior to *Abreau-Cabrera* and by an entirely different panel, the trial judge had orally pronounced sentence explicitly omitting any fine due to the defendant's seemingly dire financial situation. The government objected asserting the defendant's financial statement was false. The court continued the matter until a hearing 24 days later. At the second sentencing hearing, the defendant provided sufficient gambling slips to document his financial situation. However, the government argued the betting slips demonstrated that the defendant had been physically well enough to travel extensively to gamble. The court ultimately agreed and imposed no fine, but reversed its decision to depart downward based upon the defendant's medical condition. *Id.* at 176.

The defendant argued the district court was without power to alter the sentence as initially articulated at the first hearing. The Second Circuit disagreed holding that:

> at sentencing proceedings, discussion subsequent to an initial ruling may result in the court's modifying its initial pronouncement, all before its ruling becomes 'final.'... We see no reason for interpreting § 3582(c)'s use of "imposed" with undue rigidity, so as to lock a judge into an articulation of sentence based on

misinformation, or one sided information under these circumstances.

Id. at 176; citing *United States v. Carbone*, 739 F.2d 45, 47 (2nd Cir. 1984) (emphasis added). *Abreau-Cabrera* does not cite or refer to *Bonito*, nor does it define when oral pronouncement of sentence is completed.

Although *Bonito* pre-dated the *Abreau-Cabrera* decision, the split has continued post *Abreau-Cabrera*. In *U.S. v. Margiotti*, 85 F.3d 100 (2nd Cir. 1996), *cert. denied* ___ U.S. ___, 117 S.Ct. 324 (1996), the judge pronounced sentence before providing the defendant an opportunity to speak. After the defendant spoke, the judge then gave his reasons for adhering to the previously announced sentence. Instead of following the rigid definition of imposition of sentence articulated in *Abreau-Cabrera*, the *Margiotti* court rejected the defendant's appeal finding that "[i]n this instance, it is fair to say that the sentence was not *imposed* until after the defendant had spoken." *Id.* at 103 (emphasis in original). To give effect to the defendant's exercise of his right of allocution, the trial judge must have been empowered to impose a completely different sentence following allocution.

Finally, the Second Circuit recently revisited the imposition of sentence issue. In doing so, it perpetuated the internal inconsistency of the *Abreau-Cabrera* and *Bonito* decisions. In *United States v. DeMartino*, 112 F.3d 75 (2nd Cir. 1997), the court orally pronounced a sentence of "48 months, the sentence to run consecutive with the sentence the defendant is presently serving." On the same day, the judge signed a written judgment imposing a sentence of 63 months, 48 months of which was to run consecutively to the sentence he was currently serving. Three months later, the defendant was granted early parole for the prior sentence and appealed what had become a twelve month discrepancy between oral pronouncement and written judgment.

While the trial court claimed it was acting pursuant to Rule 35(c), the Second Circuit held said action was not authorized as the court was powerless to enter a written order which differed from the orally pronounced sentence. However, the Second Circuit noted that a sentence of 48 months would constitute a downward departure from the sentencing guidelines for which the court failed to provide its reasoning. The Second Circuit rejected the defendant's requested remedy of a written order embodying the orally pronounced sentence, and instead, exercised its discretion to remand for resentencing, placing the sole limitation that the judge articulate the reason for a downward departure, if any. *Id.* at 82.

In sum, the confusion surrounding imposition of sentence has created a quagmire of contradictory decisions in the Second Circuit. Such confusion is likely to be duplicated elsewhere, continuing the disturbing trend of incoherence in sentencing discretion.

C. The Basis for the Fourth Circuit's Opinion Involves a Split Amongst the Circuits as Regards the Purpose and Effect of the Written Order.

The Fourth Circuit's opinion is based on the determination that a written order merely memorializes the orally pronounced sentence. This holding raises a second fissure between the Circuits -- namely the effect of the written order. Technically, if the Second, Fourth, and Tenth Circuits are correct and imposition of sentence concludes with oral pronouncement, the written order can have no effect on the sentence.

However, the Tenth Circuit has held that "[w]hen an orally pronounced sentence is ambiguous, however, the judgment and commitment order is evidence which may be used to determine the intended sentence." *United States v. Villano*, 816 F.2d 1448, 1451 (10th Cir 1987). Thus, the

Tenth Circuit has held that the written order may influence the sentence ultimately served by the defendant.

Further, the language used by the Second Circuit in *Abreau-Cabrera* magnifies the division, as that court focused on the interest in "finality in sentencing" upon initial oral articulation of sentence. An emphasis on finality completely eviscerates any value that may be accorded the written judgment.

III. THIS CASE PRESENTS A LEGAL QUESTION OF SIGNIFICANT PUBLIC IMPORTANCE.

In a case such a this, where a defendant has plead guilty, sentencing is the most crucial juncture in the criminal process. Especially in drug cases, judicial fact determinations at sentencing can have a tremendous impact on the Guideline sentence by determining both weight and responsibility. Until the sentencing hearing, the judge has heard little evidence of guilt or upon which to fix punishment. The Seventh Circuit recently opined:

> It is well-known that the imposition of sentence is a critical stage of criminal proceedings, if not the most critical, particularly where the defendant has pleaded guilty.

United States v. Jackson, 32 F.3d 1101, 1105 (7th Cir. 1994) (citation omitted).

As the jury process encourages deliberate and informed decision making, so too should the judicial process encourage sentencing judges to make informed and well-reasoned decisions in determining sentence by protecting the long-standing and well established discretion of the trial court over the manner and procedure of sentencing.

A. A Rigid Definition of Imposition of Sentence Inhibits Reasoned Decision Making.

In this case, the judge delayed closure of the sentencing process to receive additional information pertaining to imposition of sentence, namely the most appropriate confinement facility. Before the sentencing process was completed, the judge further determined that he had not properly considered home confinement as a sentencing option, as required by statute, and then imposed a term of nine months home confinement.

A survey of chief justices in 1975 found that the reason most often given for supporting a requirement that judges articulate the reason for the pronounced sentence was that it would lead to "better thought-out sentences." *See* Korbakes, *Criminal Sentencing: Should the "Judge's Sound Discretion" be Explained?*, 59 Judicature 184, 191 (1975). A rigid definition of imposition of sentence hinders efforts to achieve a well-reasoned sentence.

While all decisions must become final, the interest in finality should not place an undue burden on achieving a well-reasoned and just result. The Second Circuit, post *Abreau-Cabrera*, further condemned a rigid definition of imposition of sentence which would deprive district court judges of the flexibility to correct oversights recognized during the sentencing process. The Court wrote:

> There is no reason to adopt so inflexible a rule. It would be especially inappropriate to do so at a time when district judges are already laboring under a sentencing regime that, by requiring intricate calculations and findings, necessarily complicates proceedings and increases the likelihood of technical mistakes. Sentencing is rigid and mechanistic

> enough as it is without the creation of rules that treat district judges as automatons.

Margiotti, 85 F.3d at 103.

By eliminating flexibility in conducting the sentencing proceeding, the Fourth Circuit has short-circuited the ability of either counsel to engage the court in a dialogue regarding the sentence articulated. This rigid structure would eliminate an efficient remedy where the court misconstrues evidence; fails to factor in certain evidence presented; or forgets specific sentencing options. While such issues could be raised on appeal, such instances would likely not constitute reversible error.

Moreover, under 18 U.S.C. § 3553(c), if a sentencing judge determines that the sentence must deviate from the appropriate guideline, the judge is required to thoroughly explains the reasons for the variance. While such an articulation builds a records for appellate review, it also forces the judge to "take a hard look at the relevant factors, and to focus on value judgments inherent in their sentencing decisions. *Dorszynski v. United States*, 418 U.S. 424, 457 (1973, Marshall, J., concurring). If the process of articulation immediately reveals flaws in the reasoning, the judge at that point should retain the power to appropriately modify his pronouncement.

Courting decisions that cannot stand up to inquiry from counsel erodes the well-established premise that a defendant has a right to be sentenced on the basis of accurate information. *United States v. Pless*, 982 F.2d 1118, 1129 (7th Cir. 1992). The defendant should be able to exercise that right by having an oral pronouncement corrected that, as articulated, is based upon a mistake of fact.

B. Rigid Definition of Imposition of Sentence Will Lead to Widespread Confusion and Procedural Inefficiency.

Initially, the Eleventh Circuit has noted that failure to start the Rule 35(c) clock and the time for filing a notice of appeal from the same point will lead to confusion and the unintentional loss of remedy in many cases. In the context of the previous Rule 35(b) which allowed a motion to reduce sentence "within 120 days after the sentence is imposed or probation is revoked," the Eleventh Circuit held that:

> The rule indicates that sentence is imposed when the sentencing order is an appealable final judgment. To reach a different conclusion, we would have to hold that there may be times when a sentence is imposed, a defendant is incarcerated, and the defendant must file his Rule 35(b) motion before he may appeal his sentence... Thus, sentence is imposed for the purposes of Rule 35(b) when the sentencing order constitutes a final, appealable order.

In re United States, 898 F.2d 1485 (11th Cir. 1990) (emphasis in original).

A rigid definition of imposition of sentence will prevent a judge from promptly remedying procedural mistakes, such as failure to allow the defendant to speak. Until now, many courts of appeal have allowed the "trial judge, realizing after sentencing that the right of allocution has been neglected, [to] rectify the situation by, in effect, setting aside the sentence, reopening the proceeding, and inviting the defendant to speak." *U.S. v. Barnes*, 948 F.2d 325, 329 (7th Cir. 1991) (citations omitted).

Moreover, if appeals courts such as the Second Circuit continue the trend of granting exceptions to Section 3582(c) on an ad hoc basis without consistent reasoning, more and more defendants will fall victim to assuming the judge retains sentencing authority throughout the sentencing process.

C. The Fourth Circuit's Decision Creates an Inevitable Conflict with the Guidelines Which Recognize the Interdependent Nature of Related Sentences and Will Encourage Inequity Between Co-Defendants.

When a defendant is convicted on more than one count, certain grouping rules apply in determining the offense level. United States Sentencing Commission, *Guidelines Manual*,§ 3D1.1 (Nov. 1996). Where a defendant has been convicted on one count of an indictment at an earlier time than conviction on other counts, courts have held that "logic requires § 3D1.1 be applied to all counts." *United States v. Kaufman*, 951 F.2d 793, 796 (7th Cir. 1992), *cert. denied*, 508 U.S. 913 (1993). However, the *Kaufman* court remedy of vacating the first sentence to sentence on all counts at once would not be possible if pronouncement of the first sentence immediately deprived the trial judge of sentencing jurisdiction.

Similarly, under 18 U.S.C. § 924(c), offense and underlying offense are interdependent and result in aggregate sentence, not sentences which may be treated distinctly. *United States v. Mendoza*, 118 F.3d 707, 710 (10th Cir. 1997), *cert. petition filed* Sept. 29, 1997 (No. 97-6202). A rigid definition of imposition of sentence prevents the judge from recognizing the interdependent nature and adjusting the first sentence articulated to create a coherent sentencing scheme. Where the trial court realized one of its sentences is erroneous, such a formal definition of imposition of sentence

could preclude adjustment of the entire sentencing package. *See U.S. v. Crowder*, 947 F.Supp. 1183, 1188 (E.D.Tenn. 1996) (noting that "nothing but 'pointless formalism'" would prevent the trial court from correcting an entire sentencing scheme "infested with error").

This same conflict of adjusting sentences with multiple counts also applies to instances where multiple co-defendants are convicted. The last co-defendant sentenced faces a judge with knowledge of all evidence from the previous sentencing hearings as well as all sentences articulated. The last defendant sentenced likely receives the most equitable sentence as the judge can evaluate the relative culpability of the defendants.[4] Without affording the court discretion to keep the earlier sentences open, the trial judge cannot guarantee equitable and just sentencing of all co-defendants. Without such equitable sentencing, the sentencing process easily becomes viewed as arbitrary, poorly thought out, and more concerned with form than substance.

D. Failure to Correct the Fourth Circuit's Decision Will Result in a Significant Deprivation of Liberty to the Defendant.

Finally, this case will determine whether the defendant receives credit for the nine months in home confinement which she has already served and which the trial judge, upon evaluation of sentencing alternatives, deemed just and appropriate, or whether she will serve nine months in prison. While perhaps not approaching the magnitude of

---

[4] In this case, co-defendant Jay Smith had his sentence reduced after oral pronouncement and prior to written judgment so that he did not receive a longer sentence than a co-defendant viewed by the Court as at least as culpable. However, the government failed to timely appeal that sentence.

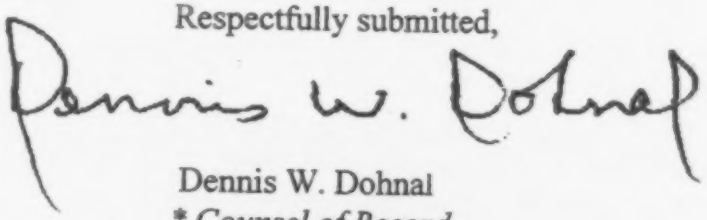
certain sentences before this Court, such a determination is of vital importance to the defendant, controlling whether or not this first time offender will be sent to prison and affecting her ability to manage her fledgling business, her opportunity to see her family, and her level of freedom.

In this case, Layman fell into a split zone authorizing imprisonment, home confinement, or a permutation of the two. While the sentencing process was continued and before entry of a written order, the trial judge determined that it was appropriate to specifically address the option of home confinement. Such an act is within the trial judge's sentencing discretion and should be upheld.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant this Peitition for Writ of Certiorari.

Respectfully submitted,



Dennis W. Dohnal
* *Counsel of Record*
BRENNER, DOHNAL, EVANS
& YOFFY, P.C.
411 East Franklin Street
Suite 200
Post Office Box 470
Richmond, Virginia 23218-0470
(804) 644-1300

John E. Lichtenstein
Charles M. Smith, Jr.
LICHTENSTEIN & FISHWICK, P.L.C.
Liberty Trust Building

Suite 505
101 South Jefferson Street
P.O. Box 601
Roanoke, Virginia 24004-0601
(540) 343-9711